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FEDERAL COMMUNICATIONS COMMISSION  
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Before the  
**Federal Communications Commission**  
Washington, D.C. 20554

In the Matter of ) MM Docket No. 93-205  
 )  
Amendment of Section 73.202(b), ) RM-8270  
Table of Allotments, )  
FM Broadcast Stations, )  
(Donalsonville, Georgia )

To: Chief, Allocations Branch  
Policy and Rules Division  
Mass Media Bureau

**MOTION FOR STAY**

Marshall W. Rowland ("Rowland"), by and through counsel, and pursuant to §1.429(k) of the Commission's Rules (47 C.F.R. §1.429(k)), hereby submits his "Motion For Stay" of the effectiveness of the Report and Order, 58 Fed. Reg. 65132, published December 13, 1993. ("R&O"), in the above-captioned rulemaking proceeding. In support whereof, the following is shown:

**Background**

1. Rowland is submitting, simultaneous with this Motion, a Petition For Reconsideration ("Petition") of the Commission's decision in the above-captioned rulemaking.<sup>1</sup> In that Petition, Rowland demonstrates that the Commission's decision was based upon false information supplied in this

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<sup>1</sup> Also cited as DA 93-1340, released December 8, 1993. The Commission's Report and Order was published in the Federal Register on December 13, 1993. Since Rowland's Motion is filed within thirty days of the date of public notice of the Commission's action, it is timely filed pursuant to §1.4(b)(1) and §1.429(d) of the Commission's rules.

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docket by Clyde Scott of EME Communications ("EME"). In this proceeding, Mr. Scott represented to the Commission that the allotment of a new FM station on Channel 298A at Donalsonville, Georgia, would eliminate all of the available area for locating a transmitter site for a new FM station on Channel 299C3 at Sasser, Georgia, allocated in MM Docket No. 90-475. See Dawson and Sasser, Georgia, 8 FCC Rcd 4366, (June 30, 1993). Accepting Scott's representations, the Commission refused to allot Channel 298A and, instead on its own motion, allotted alternate Channel 271A to Donalsonville to accommodate Channel 299C3 at Sasser.

2. In his Petition, Rowland demonstrates that there was available area for the location of a fully-spaced transmitter site for the new Sasser, Georgia allotment and that Scott's statement was, therefore, false. Rowland's own fully-spaced Sasser application (File No. BPH-930916MB) is proof of this fact. Therefore, Rowland argues that, contrary to Scott's assertions, the allotment of Channel 298A at Donalsonville would not have adversely affected the Sasser Channel 299C3 allocation.

3. In addition, in his Petition, Rowland shows that within the usable area for locating a fully-spaced transmitter site for Channel 271A, there is no land that is available for this purpose. The Commission's allotment therefore conflicts with its strict requirement that all proposed FM allotments comply with its technical requirements including its minimum distance separation and

city grade coverage rules (§73.207 and §73.315, respectively). See, FM Modifications By Application (NPRM), 7 FCC Rcd 4943 (1992). In this regard, a rulemaking petitioner must demonstrate that the allotment will satisfy the Commission's technical requirements from at least one theoretical transmitter site. See, Modifications By Application (NPRM), 7 FCC Rcd at 4944. In his Petition, Rowland shows that, given the lack of availability of fully-spaced transmitter sites, the Commission should not have allotted Channel 271A to Donalsonville. Therefore, since the Commission's allotment was mistakenly at odds with its own stated rulemaking objectives, Rowland concludes that it should be reversed.

4. Rowland's research also reveals that no party will be able to file an application for Donalsonville on Channel 271A that complies with Section 73.207(b) of the Rules. As a result, the Commission's Channel 271A Donalsonville allotment may never be implemented and the citizens of Donalsonville may be deprived of second local FM service. Given these facts, Rowland argues that the Commission should reconsider its decision and allot Channel 298A to Donalsonville, as originally proposed.

#### **The Commission's Four Part Test For Stay**

5. Under §1.429(k) of the rules, "...upon good cause shown, the Commission will stay the effective date of a rule pending a decision on a petition for reconsideration." 47 C.F.R. §1.429(k). When considering whether a party has

shown "good cause," to support a request for stay, the Commission makes the following four-part analysis:

- (1) The likelihood of irreparable injury to the petitioner in the absence of relief.
- (2) The injury to other parties in the proceeding that might follow if relief is granted.
- (3) The injury to the public interest that might result if the petition is granted.
- (4) The likelihood that a petitioner might prevail on the merits on reconsideration, review or appeal.

See, Storer Communications, Inc., 101 FCC 2d 434 (1985); WAMTC v. Holiday Tours, Inc., 559 F. 2d 841 (D.C. Cir. 1977), and Virginia Petroleum Jobbers Ass'n v. FPC, 259 F. 2d 921 (D.C. Cir. 1958).

#### Likelihood of Injury To Rowland

6. Rowland is an applicant for a construction permit for a new FM station at Sasser, Georgia, File No. BPH-930916MB. Clyde Scott, a professional technical consultant, was vice-president, a director, and 33% stockholder in Albany Radio, Inc. ("ARI"), the only other applicant for the Sasser construction permit. (See File No. BPH-930916MA.) ARI's application, as originally filed, was short-spaced by 7.1 km to the proposed Donalsonville allotment on Channel 298A. However, based on Scott's false statements concerning absence of usable area, the Commission's allotment of Channel 271A eliminated a previously incurable defect in ARI's application.<sup>2</sup> Without a stay of its Donalsonville

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<sup>2</sup> ARI filed an amendment wherein it noted that Scott had withdrawn from the corporation, but, this does not alter the fact that it was Scott's false statement that resulted in ARI's Sasser application avoiding return as unacceptable for tender.

R&O, the Commission will continue to process ARI's once-defective Sasser application. By continuing to process ARI's application, which should have been returned as unacceptable for tender, the Commission places the unfair burden upon Rowland to expend time and energy challenging its merits. Such a challenge may ultimately include his participation in a comparative proceeding, where Rowland may be forced to spend countless hours and dollars challenging an application that should have otherwise been returned. In this case, the harm to Rowland is "both certain and great" and not simply "theoretical." Wisconsin Gas v. FERC, 758 F. 2d 669 (D.C. Cir. 1985) (per curiam). Staying the effectiveness of the R&O will permit Rowland to challenge ARI's application while it is still in the processing line, thus averting a full-scale comparative proceeding, that will not only result in great expense for Rowland, but will waste the Commission's scarce resources.

#### **Injuries To Other Parties If Relief Is Granted**

7. If the Commission's R&O is stayed, no harm will come to the other parties in this proceeding. Seminole, the original Donalsonville petitioner, as well as other potential applicants for the Donalsonville allotment, will simply await the Commission's decision on Rowland's Petition before taking any action. This is not a problem, since no one can file a fully-spaced proposal for Channel 271A as there is no fully-spaced transmitter site to specify in an

application.<sup>3</sup> If the Commission grants Rowland's Petition and allots Channel 298A to Donalsonville, these parties will be able to go forward as planned.

8. The only other party to this proceeding is EME. By staying the effectiveness of the Report and Order, EME will incur no harm whatsoever. Since EME did not propose a new allotment or upgrade in this proceeding, a stay will not prohibit EME from taking any action that it would otherwise have been able to take. In as much as ARI could be considered a party to this proceeding (since Clyde Scott was previously an ARI principal) no harm will come to it either. Therefore, as Rowland has shown, no harm will come to the other parties in this proceeding if his Motion is granted.

#### **Injury To Public Interest**

9. No injury to the public interest will result if Rowland's Motion is granted. Since there is no usable area to locate a fully-spaced transmitter site for Channel 271A at Donalsonville, no party should be inconvenienced by not being able to file an application for the new FM station.

#### **Likelihood of Success of Rowland's Petition**

10. In his Petition, Rowland provides conclusive evidence that Mr. Scott falsely represented the lack of availability of usable Sasser transmitter sites.

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<sup>3</sup> While potential applicants may avail themselves, of the "contour protection" alternative contained in §73.215 of the Commission's rules, such a proposal may adversely affect the applicants' coverage and could require a directionalized operation that an applicant may not have the financial wherewithal to propose.

Furthermore, through the submission of statements from land owners and an engineering study, Rowland demonstrates that there are no usable fully-spaced transmitter sites to implement the Donalsonville Channel 271A allotment. These facts can lead to but one conclusion - that the Commission erred when it relied upon Mr. Scott's misstatement and when it chose Channel 271A for the new Donalsonville allotment. Such a clear set of facts cry out for reconsideration in this case. Rowland is confident that, upon further examination, the Commission will reconsider its R&O and allot Channel 298A to Donalsonville as originally proposed.


#### **Conclusion**

11. Rowland has met each of the Commission's four tests to support a Motion For Stay. By staying its R&O, the Commission will be helping to correct an injustice that has occurred in this proceeding as the result of one party's false representation. No harm will result and a stay will permit Rowland the opportunity to properly challenge the further processing of ARI's Sasser application.

**WHEREFORE**, the above-facts considered, Marshall W. Rowland, Sr., hereby respectfully requests that the Commission **STAY** the effective date of its R&O, pending the outcome of Rowland's Petition For Reconsideration in this proceeding.

Respectfully submitted,

**MARSHALL W. ROWLAND, SR.**

A handwritten signature in black ink, appearing to read "Gary S. Smithwick", written over a horizontal line.

By:

Gary S. Smithwick  
Shaun A. Maher

His Attorneys

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January 12, 1994

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**CERTIFICATE OF SERVICE**

I, Lori Paige DiLullo, a secretary in the law firm of Smithwick & Belendiuk, P.C., certify that on this 12th day of January, 1994, copies of the foregoing were mailed via first class mail, postage pre-paid, to the following:

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